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CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-770

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATIONAL CRUSHED STONE ASSOCIATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION FOR THE NATIONAL CRUSHED STONE ASSOCIATION, ET AL.

Respondents National Crushed Stone Association, et al., submit this brief in opposition to the petition of the Environmental Protection Agency. The grounds for our opposition are that the issues raised are not sufficiently important to warant review by this Court, that the alleged conflict in the circuits is illusory, that

the decision below was fair and correct, and that the regulation at issue is invalid on grounds not contested by EPA.

We accept petitioner's statements as to the opinions below, jurisdiction, and the statute involved and thus will not repeat these.

QUESTIONS PRESENTED

1. Whether the Court below properly held that EPA's variance clause for effluent limitations based upon application of the "best practicable control technology currently available" must provide for consideration of economic factors.

2. Whether EPA's variance clause is invalid on the additional ground that it fails properly to take into account the statutory factors set forth in Section 304 (b)(1)(B) of the Act, 33 U.S.C. § 1314(b)(1)(B).

3. Whether the Court below properly held that EPA's variance clause is ripe for review, since it presents a discrete legal issue that is capable of pre-enforcement review.

STATEMENT OF THE CASE

The factual and legal setting in this case is more complex than indicated by petitioner. Accordingly, we wish to present an additional discussion of facts material to the questions presented for review.

The Clean Water Act contains a comprehensive scheme for the regulation of waste water discharges from point sources. Of concern here is the requirement in Section 301(b)(1)(A) of the Act (33 U.S.C. § 1311 (b)(1)(A) that industrial dischargers achieve by July 1,

1977, effluent limits based upon the application of the "best practicable control technology currently available" (herein "BPT") as defined by EPA in guidelines published under Section 304(b)(1)(B) of the Act. 33 U.S.C. § 1314(b)(1)(B). The latter provision enumerates particular factors that must be taken into account by EPA in establishing the BPT effluent limitations guidelines.

The effluent limitations guidelines are not self-enforcing. Specific effluent limits for particular industrial facilities are established in National Pollutant Discharge Elimination System ("NPDES") permits issued under Section 402 of the Act, 33 U.S.C. § 1342.[1]

As EPA began implementing the 1972 Amendments to the Act,[2] a controversy developed as to the relationship between effluent limitations guidelines and effluent limits applicable to particular facilities. This dispute was resolved in this Court's decision in *duPont* v. *Train,* 430 U.S. 112 (1977). There this Court upheld EPA's authority to publish BPT effluent limitations by regulation "so long as some allowance is made for variations in individual plants." *Id.* at 128. The Court noted that EPA in the case before it had published a variance clause for the 1977 BPT limitations, but declined to consider at that stage "whether EPA's variance clause has the proper scope," as did the Court below (the Fourth Circuit) in that case. *Id.* at n.19.

The validity of EPA's variance clause was ruled upon by the Fourth Circuit shortly after its decision

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[1] These permits set forth specific limits on the amounts of various substances that may permissibly be discharged. *See* EPA v. State Water Resources Control Board, 426 U.S. 200, 205 (1976).

[2] Pub. L. 92-500, 86 Stat. 816, 33 U.S.C. § 1251 et seq.

in *duPont, supra.* In *Appalachian Power Co.* v. *Train,* 545 F.2d 1351 (4th Cir. 1976) the Court found that the variance clause was ripe for review, and found it deficient. In particular, the Court held that EPA had "offered no reasoned explanation for limiting the variance clause to considerations of technical and engineering factors," and for failing to take into account factors such as energy requirements, adverse non-water quality environmental impact and costs. 545 F.2d at 1359. The Court accordingly remanded the case to EPA to "come forward with a meaningful variance clause . . . taking into consideration at least the statutory factors set out in §§ 301(c), 304(b)(1)(B) and 306(b)(1)(B)."[3] *Id.* at 1359-60

EPA certainly knew that the Court's decision in *Appalachian Power* would become final in the absence of a request that this Court review the matter; yet the Agency chose not to seek certiorari.

One year after the decision in *Appalachian Power, supra,* EPA published final BPT effluent limitations for the crushed stone and construction sand and gravel industries.[4] These limitations were accompanied by the same variance clause that the Court had found invalid in *Appalachian Power.*[5] The National Crushed Stone Association and two individual companies jointly sought review of these regulations. In a decision announced on June 18, 1979, the Fourth Circuit unanimously held invalid the substantive effluent limitations,

[3] The reference to § 306(b)(1)(B) is to a variance for new sources, which is not involved here.

[4] 42 Fed.Reg. 35,843-852 (1977); 40 C.F.R. §§ 436.20-436.32 (1977).

[5] 40 C.F.R. §§ 436.22, 436.32 (1977).

and EPA does not challenge that aspect of the decision below.[6] The Court also held that the variance clause was defective under its prior decision, and accordingly "remand[ed] the variance provisions to the Agency for compliance with *Appalachian Power Company.*" *National Crushed Stone Ass'n* v. *EPA,* 601 F.2d 111, 124 (4th Cir. 1979).

EPA subsequently sought a stay of the mandate of the Fourth Circuit pending its application for a writ of certiorari. The Fourth Circuit denied EPA's request. The variance clause is now before EPA, on remand, and to date the Agency has not announced how it will proceed.

REASONS FOR DENYING THE WRIT

1. The Variance Clause Is Invalid On Grounds Not Challenged By EPA

EPA has asked this Court to review only the issue of whether the Court below improperly concluded that the variance clause must provide for the consideration of certain economic factors. The significance of this issue is diminished by the fact that the Court below held the variance clause invalid on other grounds not challenged by EPA.

In its briefs before the Fourth Circuit, the National Crushed Stone Association argued that EPA's variance clause failed to take into account these site-specific factors, such as land unavailability and non-water quality impacts, even though the Agency in its brief admitted that they were relevant.[7] Section 304(b)(1)(B)

[6] *See* EPA Petition at 10.

[7] *See* the Association's Br. below at 52-56 and Reply Br. at 26-28; EPA's Br. below at 35, 55-56 and n. 44. Crushed stone

of the Act clearly requires that such factors be taken into account in establishing effluent limitations guidelines.[8]

The Fourth Circuit in *Appalachian Power* did not limit its remand to economic aspects of the variance clause, and also held that EPA had "offered no reasoned explanation" for failing to consider other factors such as adverse non-water quality environmental impact * * * [and] energy requirements." 545 F.2d at 1359. In the decision below, the Court remanded the variance clause to EPA "for compliance with *Appalachian Power Company,*" noting that the industry's argument did not emphasize the economic factors but "largely is devoted to other specific factors they claim should be considered in determining whether or not to grant a variance." (*Id.* at 124). Thus the variance clause was held invalid by the Court below on grounds far broader than the economic issues raised here by EPA.

2. The Conflict Alleged By EPA Is Illusory

The heart of EPA's petition lies in its allegation that there is a conflict between the Fourth and District of Columbia Circuits as to the validity of the variance

and construction sand and gravel mining and processing plants operate in virtually every region of the country, and are subject to varying climatic, hydrological, topological and geologic conditions. These varying conditions affect the volume and constituents of waste water discharges and also the feasibility of treatment.

[8] This provision expressly requires EPA to take into account "the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements) and such other factors as the Administrator deems appropriate." 33 U.S.C. § 1314(b)(1)(B).

clause and its consideration of economic factors. This contention will not withstand scrutiny.

Part of the difficulty on this score lies in EPA's confusion of two issues, namely (1) whether the variance clause must make some provision for consideration of economic factors, and (2) whether the variance clause must specifically require the consideration of the economic ability of an individual discharger of pollutants to afford the costs of such technology, or "affordability." EPA has also misstated the holding of the Court below.

As to the former, it is significant that EPA's position before the Fourth Circuit initially was that economic factors could not be considered *at all* in granting a variance request. *See Appalachian Power, supra,* 545 F.2d at 1359-60, n. 22.[9] Based on the language and history of the Act, the Court in that case had no difficulty in rejecting that position. In *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011 (D.C. Cir. 1978), the Court similarly held that "the 'total cost' of pollution control at the petitioning mill must be considered under a satisfactory variance provision." *Id.* at 1036. Thus there is no conflict between the two appellate courts on the appropriateness of considering an individual plant's costs in a variance proceeding. EPA's petition now concedes that such costs may be considered (EPA Petition at 7-8), however the variance clause at issue here does not so provide.

To support its claimed conflict, EPA sidesteps this issue and argues that the D. C. Circuit in *Weyerhaeuser,* contrary to the Fourth Circuit, further held

[9] *See also* Weyerhaeuser Co. v. Costle, 590 F.2d at 1011, 1038 (D C. Cir. 1978).

that plant-specific economic capability (or affordability) alone is not grounds for a BPT variance.[10] The difficulty with this argument is that the Fourth Circuit expressly stated that this was *not* its holding, and rejected EPA's contrary suggestions calling them "*no better than straw men.*"[11] Further, the Court below specifically addressed EPA's claimed conflict in the circuits and stated that its "construction of the variance provisions seems generally, if not precisely in accord with that of the Court in *Weyerhaeuser Co.* v. *Costle.*"[12] The absence of a square conflict is evident from a careful reading of the two decisions. Both Courts have held that the Agency must give permittees the ability to secure variances from the 1977 limitations analogous to their ability to secure variances from the 1983 standards. *See Weyerhaeuser, supra,* 590 F.2d at 1034; *National Crushed Stone Association, supra,* 601 F.2d at 123-24. These decisions are consistent with this Court's holding in *duPont, supra,* that it would be "highly anomalous" to read the Act to allow a different pattern of promulgation for the 1977 regulations than clearly set forth for the 1983 regulations. *duPont, supra,* 430 U.S at 127-28.

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[10] EPA Petition at 13-14.

[11] 601 F.2d at 124. The Court reiterated its statement in *Appalachian Power* that a plant could obtain a variance "if it is doing all that the maximum use of technology within its economic capability will permit *and* if such use will result in reasonable further progress toward the elimination of pollutants" and if it complies with "any other requirements of the variance." *Id.*

[12] *Id.* (citation omitted). The D.C. Circuit similarly rejected a decision of the Tenth Circuit upholding EPA's variance provision, finding the Fourth Circuit's reasoning in *Appalachian Power* to be "more persuasive." *Weyerhaeuser, supra,* 590 F.2d at 1036, n.35.

3. The Issues Raised Are Not Sufficiently Important To Warrant Review By This Court

Despite EPA's weak protests to the contrary, this case can hardly be claimed to be one deserving of review by this Court.

In the first place, the decision below at least in part reflected the particular facts of this case. EPA's development document for mineral mining had recommended the *same* effluent limits be established for the 1977 BPT and the 1983 BAT requirements. EPA had acknowledged that economic affordability could be grounds for a variance from the BAT limits. "This situation could easily close a plant in 1979 which [under the 1977 BPT standards] would be allowed to operate under a variance in 1983," a result that the Court below found could not have been intended by Congress. 601 F.2d at 124.

Secondly, EPA's contention that the variance clause threatens the Congressional goal of eliminating water pollution must be rejected out of hand. The decision below expressly held that BPT variance must "result in reasonable further progress toward the elimination of the discharge of pollutants." 601 F.2d at 124.

Finally, the decision below is of limited applicability. It applies directly only to the crushed stone and construction sand and gravel industries, and has also been applied by the Fourth Circuit to the coal mining industry. The limited nature of this ruling is underscored by the judicial review provisions of the Act, which provide that EPA effluent limitations may be challenged only by the filing of a petition for review within 90 days of promulgation of the regulations in

question.[13] EPA recites that there are BPT variance clauses in 38 other industries for which BPT regulations have been promulgated for some time, but does not suggest that any of these variance clauses (for which the 90-day period has passed) could now be subject to judicial review.[14] These considerations also warrant rejection of EPA's suggestion that there is a ripeness issue here, an argument that is apparently not strongly advanced.[15]

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[13] 33 U.S.C. § 1369(b)(1).

[14] Apparently EPA also is of the view that somehow the decision below will apply to EPA's BAT variance clause, because the BPT standards are a minimum or "floor" below which a BAT variance may not be granted, and it may be argued that the BPT variance must be considered in determining that floor. This issue was neither argued to nor addressed by the Court below. Moreover, if anything, this point underscores the correctness of the Fourth Circuit's comments as to the relationship between the BPT and BAT variances.

[15] EPA's petition (at 21) acknowledges that the Agency's position "presents a discrete legal issue that is capable of pre-enforcement renew." Both the D.C. Circuit and the Court below found the variance clause to be reviewable.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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